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IN THE

Supreme Court of the United States

No. 708

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, *Petitioner*

vs.

FRANCIS L. HAWES, Individually and as Trustee

and

RAYMOND D. EVANS, Trustee, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR FRANCIS L. HAWES IN OPPOSITION

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Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia is reported in 132 F. 2d 569.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was dated October 12, 1942 (R. 79). The petition for rehearing was denied November 4, 1942 (R. 79, 80). The mandate was issued January 7,

1943.[1] Judgment on the mandate was entered February 4, 1943.[2] The petition for a writ of certiorari was filed February 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and paragraph c of Section 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States amended to May 26, 1941.

Statement

Respondent deems it necessary under authority of Rule 27 (4) to supply a full statement.

The case was brought on March 3, 1941, to the United States Court of Appeals for the District of Columbia on appeal from a decree of the District Court of the United States for the District of Columbia dismissing a complaint of petitioner. On June 4, 1941 the respondent, Francis L. Hawes, filed a motion to dismiss the appeal in the Court of Appeals upon the ground, among others, that it was not noted within time (R. 48). On November 13, 1941 this motion was denied without prejudice to the respondent's right to renew the same, upon the single ground mentioned, at the argument on the merits (R. 59). The motion was renewed (R. 60) and was argued at the time of the argument on the merits (R. 74). On October 12, 1942 the Court of Appeals granted the motion to dismiss (R. 79).

Facts pertinent to the grounds for the motion to dismiss follow. After the hearing of the case in the District Court

[1] Proof of this date may be obtained by certiorari to the United States Court of Appeals for the District of Columbia in order to correct diminution of the record.

[2] Proof of this may be obtained by certiorari to the District Court of the United States for the District of Columbia in order to correct diminution of the record.

of the United States for the District of Columbia on April 19, 1940, and oral pronouncement in the presence of both parties by the Trial Court of the findings of fact and conclusions of law on April 24, 1940, on May 1, 1940 petitioner handed in proposed findings of fact. Respondent handed in findings of fact, conclusions of law and a decree for signature of the court. When the Trial Court indicated that it would sign the findings of fact, conclusions of law and decree submitted by respondents, Mr. Johnson, counsel for the petitioner, obtained a few days to submit further findings, which however, were never submitted. The respondent's proposed findings of fact, conclusions of law and decree dismissing the complaint were signed and filed by the court on May 7, 1940. (See full statement of occurrences, Exhibit C at R. 67, 68, Tr. 32, 34, 36.) This judgment was noted in the clerk's Civil Docket on May 7, 1940 (Tr. 36 and supplemental transcript of record).

No note in the Civil Docket of the mailing made by the clerk appears in the record, but the clerk's affidavit shows that he made a large letter "N" in the Day Book of Civil Division No. 3 beside the final decree entered in that book, which signified that notice of the entry of the final decree was written up for mailing to the parties therein (Tr. 47).[1] The usual custom is that a messenger picks up such notices and places them in the mail. There is no direct evidence that it was not done in this case, nor is there any direct evidence in the record that petitioner failed to receive a notice. Advertisement of a foreclosure sale of the property involved in the suit to take place on June 4, 1940 appeared publicly in the newspaper May 13, 18, 25, 28 and June 3, 1940 (Exhibits E, F at R. 12, 13, 14). Publication of the

[1] This may be obtained by certiorari to the District Court of the United States to correct diminution of the record.

entry of the decree dismissing suit appeared in the legal record of the Washington Post on May 8, 1940 (Tr. 48).

On June 3, 1940 petitioner's attorney hinted that he was going to appeal the case. Respondent's attorney told him that petitioner could not appeal, that it was too late. Whereupon petitioner's attorney rejoined that petitioner had 40 days from the date of the entry of judgment and that the time for appeal had not elapsed, and he then explained that he did not know about the twenty day limit for taking appeals. (See full statement in Exhibit C at R. 68.) The twenty day period for noting an appeal expired May 27, 1940. The record docketed in the Court of Appeals March 3, 1941 discloses that no notice of appeal was filed by petitioner in the District Court during that twenty day period, although one was filed on June 3, 1940 (Tr. 37 and supplemental trans. of record).

On June 6, 1940, more than twenty days after entry of judgment on May 7, 1940, petitioner filed a motion in the District Court to enter judgment and direct the clerk to notify parties (Tr. 38). Petitioner asserts broadly in his statement on page 2 of the petition for a writ of certiorari that the reasons assigned in said motion were that "* * * neither counsel nor litigant knew or had notice of the action of the Court as required by Rule 77 (d) of the Federal Rules of Civil Procedure", whereas the only analogous ground of the motion was based on the alleged failure of the clerk to notify the parties of the action of the court (Tr. 38). This motion was opposed by the respondent in amended points and authorities filed on June 7, 1940 (Tr. 39). The motion was subsequently dismissed by the District Court on June 24, 1940 (Tr. 49).

Meanwhile on June 13, 1940 the Trial Court entered an order vacating the judgment of May 7, 1940 without notice to respondent or opportunity to be heard (Tr. 42, Exhibit C at R. 67, 69). The record does not show the filing of any motion or notice in writing to vacate the judgment of May 7, 1940 either before or after the expiration of the 20 day period for noting an appeal; the only entry in the record concerning vacation of the judgment is that of the order of June 13, 1940 vacating the judgment (Supplemental transcript of record, Exhibit A at R. 65, Tr. 42). On the same day, June 13, 1940, the Trial Judge signed and filed a second judgment in the same or similar terms as the one of May 7, 1940 (Tr. 41). On June 14, 1940 petitioner filed a notice of appeal from the judgment of June 13, 1940 in favor of Francis L. Hawes and Raymond D. Evans against Bertha Byrd (Tr. 43). Respondent filed a timely motion in District Court on June 24, 1940 to reconsider the order to vacate the judgment (Tr. 44) with the attached affidavit and exhibit (Tr. 47, 48). Inasmuch as no order overruling this motion had been entered (Exhibit A at R. 65) respondent offered the explanation to the Court of Appeals that the Trial Court overruled said motion stating that it did not wish to cut off any person from an appeal, and that respondent's attorney had drawn up an order overruling said motion when it became evident that the record was incomplete and presented this order to petitioner's attorney for signing and filing (Exhibit B at R. 65), which signing and filing was never consumated.

Summary of Argument

The United States Court of Appeals for the District of Columbia properly dismissed the appeal of the petitioner for failure to file a notice of appeals within 20 days from

the entry of judgment on May 7, 1940 in the District Court of the United States for the District of Columbia. Rule 10 of the rules of the Court of Appeals provided that no judgment of the District Court of the United States for the District of Columbia or of any justice thereof was to be reviewed by the Court of Appeals, unless the appeal was taken within 20 days after the judgment complained of had been made or pronounced.

Petitioner's contention that the Act of February 13, 1925, 43 Stat. 936, c. 229, Section 8 (c); Title 28, Section 230, United States Code Annotated, allowing an appeal intended to bring any judgment or decree before the Circuit Court of Appeals for review, provided application be made within three months after the entry of such judgment or decree included the United States Court of Appeals for the District of Columbia is without foundation.

The taking of appeals from the District Court of the United States for the District of Columbia to the United States Court of Appeals for the District of Columbia has been governed by Rule 10 of the court, in effect to February 1, 1941, promulgated under authority of the Act of February 4, 1893, C. 74, 27 Stat. 434 as supplemented by the Act of July 30, 1894, C. 172, 28 Stat. 160; C 2, Section 25, Title 18, The Code of the District of Columbia. The Act of 1894 did not repeal the Act of 1893 and the authority to make rules "* * * for the taking of appeals to said Court," was the same that the Act of 1893 gave to make rules for the time and method of the entry of appeals.

This power has not been abrogated either by express or implied repeal in the Judiciary Act of 1925, above mentioned. The Court of Appeals of the District of Columbia

was specifically mentioned in that Act where Congress intended the Act to apply and perusal of the whole legislation will show that Congress did not refer to said court as a Circuit Court of Appeals. Section 8 (c) thereof did not mention the Court of Appeals of the District of Columbia.

B.

There is nothing in either Rule 10 of the United States Court of Appeals for the District of Columbia or in the Federal Rules of Civil Procedure providing for an extension of time for noting an appeal from a judgment properly entered. The Court of Appeals properly interpreted the Federal Rules of Civil Procedure, including Rule 77 (d), and applicable decisions of this Court condemning devices for extending the time for taking appeals.

The Trial Court properly settled the form of the judgment and directed that it be entered by the clerk on May 7, 1940 in accordance with Rule 58 of the Federal Rules of Civil Procedure. The clerk properly noted the judgment in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) *id.* Compliance with Rules 58 and 79 (a) was all that was necessary to make the judgment effective. Respondent contends that the twenty days for noting an appeal ran from this judgment as entered. Petitioner's contention that the failure of the clerk to make a note in the docket of the fact of mailing notice of the entry in accordance with Rule 77 (d) tolls the running of the 20 days for appeal disregards the plain meaning of Rules 58 and 79 (a) and would leave them meaningless.

The action of the Trial Court in vacating this judgment after the expiration of the 20 day period at the request of

petitioner because of the alleged failure of the clerk to comply with Rule 77 (d) and the reentering of a judgment in the same terms as of a later date was unwarranted and ineffective to extend the time for noting an appeal. The Court of Appeals properly granted the respondent's motion to dismiss after hearing the arguments on the motion to dismiss and the merits of the case.

ARGUMENT

A

Authority of the United States Court of Appeals for the District of Columbia to fix by rule a different time for reviewing judgments of the District Court of the United States for the District of Columbia than that prescribed for bringing any judgment before a Circuit Court of Appeals.

History of Legislation.

A brief history of Congressional legislation for the courts of the District of Columbia in connection with legislation for courts of the United States generally discloses that the Act of February 27, 1801, 2 Stat. 103, erected a Circuit Court of the District of Columbia and conferred all powers by law vested in Circuit Courts of the United States. The Act of March 3, 1863, C. 91, 12 Stat. at L. 762, abolished the Circuit, District and Criminal Courts of the District of Columbia and established the Supreme Court of the District of Columbia with the right of appeal from the special term of the Court to the general term. The court in general term was required to adopt such rules as it thought proper to regulate the time and manner of making appeals.

The Act of March 3, 1891, C 517, 26 Stat. 826, to establish Circuit Courts of Appeals throughout the country provided that no appeal was to be taken except within six months after the entry of judgment.

Creation of the Court of Appeals of the District of Columbia.

The Court of Appeals for the District of Columbia was established by the Act of February 9, 1893, C. 74, 27 Stat. 434, which provided in Section 6 that the Court was to make rules it deemed necessary for the transaction of business and for the time and method of the entry of appeals from the Supreme Court of the District of Columbia. In pursuance of the mandate of the statute the Court promulgated Rule IX found in 21 W. L. R. 275, 278, 1 App. D. C. V, XIV, which limited the time for taking appeals to 20 days, Sundays excluded, after the judgment complained of had been made or pronounced.

The Act of February 9, 1893, was amended by the Act of July 30, 1894, 28 Stat. 160, which expanded the powers of the Court of Appeals for the District of Columbia and provided in Section 6 of the Act, Title 18, C. 2, Section 25 of the Code of the District of Columbia, 1929, that the Court make rules and regulations necessary for the transaction of its business and the taking of appeals to said Court. It was given further power generally to regulate all matters relating to appeals in the Court below and in the Court of Appeals. The Court of Appeals by virtue of the acts of Congress promulgated Rule 10 on September 29, 1894, found in 4 App. D. C. V, XVII, which was the same as its former Rule IX.

It may well be argued that the refusal of Congress in the supplementary legislation of 1894 to withdraw the power of

the Court of Appeals of the District of Columbia to fix by court rule the time for entry of appeals exercised by the Court in its Rule IX, *supra*, and its reaffirmance of that power by directing the Court to make rules for the taking of appeals is a clear indication of the intent of Congress to leave this power in the Court. This rule-making power was specifically upheld by the Supreme Court of the United States in the case of *Ex Parte* Dante, 228 U. S. 429, 57 L. Ed. 905, 33 S. Ct. 579, decided on April 28, 1913, which recited that the Act of Congress of February 9, 1893 created and conferred power to make rules, that Rule 10 was promulgated providing for no appeal unless taken within 20 days after judgment and that such rule was still in force and was the only rule governing the time within which appeals from the Supreme Court of the District of Columbia were to be taken to said Court of Appeals.

The Effect of the Judiciary Act of 1925.

When Congress in the Act of February 13, 1925, C. 229, 43 Stat. 936, amended the Judicial Code and further defined the jurisdiction of the Circuit Courts of Appeals and stated other purposes it must be presumed to have had knowledge of the existence of the rules of the Court of Appeals of the District of Columbia interpreting the Acts of 1893 and 1894 to give that Court power to limit the time for taking appeals to 20 days from a judgment of the Supreme Court of the District of Columbia. Its express intention to amend only sections 128, 129, 237, 238, 239 and 240 of the Judicial Code further demonstrates this since none of those Judicial Code sections applied to the Court of Appeals of the District of Columbia. *Ex Parte Dante, supra*, involving the dismissal of an appeal from a judgment dated June 22, 1912 was decided after the enactment of the Judicial Code of 1911.

Congress in enacting the Judiciary Act of 1925 furnished abundant evidence that it did not intend the Court of Appeals of the District of Columbia to be governed by part 8 (c) of Section 240 prohibiting appeals more than three months after judgment. This section mentioned only " * * * a Circuit Court of Appeals * * * " Sections 239, 140 (a) and (c), 5 and 8 (b) used the terminology " * * * in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia * * * " Section 6 (a) applied to a Circuit Court of Appeals, while 6 (b) provided specifically for the Court of Appeals of the District of Columbia. Petitioner's attempt to stress on page 10 of his brief that Section 5 of that Act of 1925 applied to anything more than a bankruptcy case demonstrates the weakness of his argument.

Section 2 of the Act of 1925 refers only to " * * * a Circuit Court of Appeals * * * " in enumerating statutes such as the Federal Trade Commission Act appeals from which are included among the cases covered by Sections 239 and 240 of the Judicial Code. This Court in *Federal Trade Commission v. Klesner*, 274 U. S. 145, 71 L. Ed. 972, 47 S. Ct. 552 has held that the Federal Trade Commission Act, 38 Stat. 717, conferring jurisdiction in that Act on Circuit Courts of Appeals to enforce commission orders, included by interpretation the Court of Appeals of the District of Columbia. Congress was held not to intend that there should be no means of enforcement of that Act in the District of Columbia. The situation was different in *United States v. Burroughs*, 289 U. S. 159, 77 L. Ed. 1096, 53 S. Ct. 574, in which this Court held that a statute authorizing direct appeals from District Courts to the Supreme Court of the United States in certain criminal cases did not apply to the Supreme Court of the District of Columbia which had a statute providing generally for all appeals to be taken to

the Court of Appeals of the District of Columbia. The opinion stated further that implied repeals were not favored, and if effect could reasonably be given to both, the presumption was that the earlier was intended to remain in effect. See also, *Johnson v. United States*, 38 App. D. C. 347, 225 U. S. 405, 32 S. C. 752, 56 L. E. 1142; *Kleindienst v. United States*, 48 App. D. C. 190; *O'Brien v. United States*, 69 App. D. C. 135, 99 F. 2d. 368.

Status of United States Court of Appeals for the District of Columbia and Rule 10.

The Laws of 1893 and 1894, *supra*, were not embraced within this Judiciary Act of 1925; neither are they or Rule 10 of the Court of Appeals of the District of Columbia inconsistent with the act which limits the time for taking appeal to "* * * a Circuit Court of Appeals * * *" In *O'Donoghue v. United States*, 269 U. S. 516, 77 L. Ed. 1356, this Court said that Congress could establish inferior federal courts in the District of Columbia under the authority of Article III of the Constitution of the United States and that they are courts of the United States, but it is not required to make them district or circuit courts. *United States v. Burroughs*, *supra*, stated the distinction between district courts and courts of the United States, which latter phrase included the Supreme Court of the District of Columbia.[2] In any event it is not necessary to make this distinction when the organic act establishing the Court of Appeals of the District of Columbia gives it power to govern the taking of appeals and this power has not been expressly withdrawn. Regarding *Alaska Packers v. Pillsbury*, 301 U. S. 174, cited by petitioner, there was not a separate organic

[2] Name changed to District Court of the United States for the District of Columbia (June 25, 1936, 49 Stat. 1921, c. 804).

act creating the Court of Appeals in the Ninth Circuit and giving it the rule making power that was given the Court of Appeals of the District of Columbia. There was no doubt that it was a Circuit Court which was governed by Section 8(c) of the 1925 Judiciary Act fixing the method of applying for appeals.

The Act of June 7, 1934, C. 426 (48 Stat. 926), Public No. 298, specifically mentioned the organic Act of 1894 establishing the Court of Appeals for the District of Columbia and provided that it was to be amended to change the name of the court to the United States Court of Appeals for the District of Columbia. Thus Congress recognized that this Court had been created and had existed apart from Circuit Courts and that the Judiciary Act of 1925 had no effect on it to make it a Circuit Court of Appeals. The District of Columbia is not one of the named circuits set forth in all the legislation of Congress establishing the various circuits. That Congress in Title 11 U. S. C. A., Section 47 (A) mentioned "* * * Circuit Courts of Appeal of the United States and the United States Court of Appeals for the District of Columbia * * *" while in subsection (c) and in section 48 (a) it used the words "Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia" is indicative of a clerical error only on the face of the legislation and, of course, does not constitute it a Circuit Court of Appeals. The Federal Rules of Civil Procedure remove any vestige of doubt on this score in Rule 81 (d) which states that when reference is made in the rules to a Circuit Court of Appeals, the reference includes the United States Court of Appeals for the District of Columbia.

This Court may take judicial notice that the United States Court of Appeals for the District of Columbia, since the Judiciary Act of 1925, has continued to promulgate and use its Rule 10 limiting the time for taking appeals to 20 days under the authority of the Acts of 1893 and 1894 throughout the years. In the case of *Burke v. Canfield*, 72 App. D. C. 127, 111 F. 2d. 526, and in promulgation of its rules effective February 1, 1941, it recognized and exercised its power. Legislation once judicially or even administratively interpreted, if left for a long period of time unchanged, unmodified, or unamended, may well justify the conclusion that the judicial or administrative interpretation was in accord and not at variance with the legislative intention. *Swigart v. Baker*, 229 U. S. 187, 57 L. Ed. 1143, 33 Sup. Ct. 645, *Bardwell v. Petty*, 52 App. D. C. 310, 286 F. 772, *United States ex rel. Queen v. Alvey*, 182 U. S. 456, 45 L. Ed. 1369, 37 S. Ct. 741. Rule 73 (a) of the Federal Rules of Civil Procedure providing for the simplified practice of filing a notice of appeal with the District Court within the time prescribed when an appeal is permitted by law to a Circuit Court of Appeals demonstrates careful draftsmanship in recognizing that there may be more than one law permitting appeals and prescribing time for noting them.

Thus, in conclusion of this phase of the argument, respondent contends that the United States Court of Appeals for the District of Columbia had ample authority to promulgate Rule 10 limiting the time for taking appeals to twenty days after judgment entered in the District Court of the United States for the District of Columbia.

B

The Court of Appeals has properly interpreted the Federal Rules of Civil Procedure and has properly applied decisions of this Court condemning the use of devices by courts to extend the time for taking appeals.

The Federal Rules of Civil Procedure.

The Trial Court properly made its finding of facts and conclusions of law in accordance with Rule 52 (a) of the Federal Rules of Civil Procedure (Exhibit C at R. 67, Tr. 32, 34). It properly settled the form of the judgment and directed that it be entered by the clerk in accordance with Rule 59 *id.* (Tr. 36). The clerk properly noted the judgment in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) *id.* (Tr. 36 and supplemental transcript of docket entries). Petitioner's filing of a notice of appeal June 3, 1940 (Tr. 37 and supplemental transcript) was six days after the 20 day limit for noting an appeal had expired. The Court of Appeals properly granted the motion to dismiss for failure of petitioner to note his appeal within time.

A failure of the clerk to serve a notice of the entry of the judgment by mail and make a note in the docket of the mailing in accordance with Rule 77 (d) *id.* would not affect the judgment. Performance of this duty was not a prerequisite to the effectiveness of the judgment or to the running of the period within which an appeal should have been taken. Compliance with Rules 58 and 79 (a) was sufficient to make the entry of judgment effective for all purposes. *Siegel v. Margiotta*, 102 Fed. 2d. 525. Since the judgment was properly of record a failure of the clerk to comply with Rule 77 (d) did not warrant the District Court's setting it aside. Its

action was ineffective to achieve an extension of time for appeal.

Petitioner's mention of Rule 6 (c) in his petition for certiorari was abandoned in his brief apparently because he realized that the 20 days for taking appeal had expired six days before notice of appeal on June 3, 1940 and probably also because he realized that the rule had no application since there is no requirement in the rules that an appeal be noted 20 days after service of notice of entry of judgment.

The prohibition of Rule 6 (b) against the District Court's enlarging the period for the taking of an appeal as provided by law is absolute. It cannot be accomplished by the secretive device of vacating the original judgment of May 7, 1940 on June 13, 1940 (Tr. 42, Exhibit C at R. 67, 69, supplemental transcript of record showing docket entries) and reentering an identical judgment as of June 13, 1940 (Tr. 41, supplemental transcript of record showing docket entries). Rule 10 of the Rules of the United States Court of Appeals for the District of Columbia in effect until February 1, 1941, which have the effect of law, makes no provision for extending the time for noting an appeal. Petitioner's admitted participation in the secret proceedings (paragraph two on page 2 of the Statement in the petition for certiorari) and his noting an appeal from the order of June 13, 1940 on June 14, 1940 (Tr. 43, supplemental transcript showing docket entries) was ineffective to accomplish this in the face of the record.

The omission of the clerk to mail the notice of entry of judgment, (if there had been such omission), and to make a note in the docket of the mailing was not a clerical mistake in the judgment itself within Rule 60 (a). The action of the

trial court in vacating the judgment for that reason (Tr. 42) was excessive and not in contemplation of the rule. There was no motion before the trial court to relieve a party or his legal representative from a judgment taken against him through his mistake, inadvertance, surprise, or excusable neglect within Rule 60 (b) (Exhibit A at R. 65, supplemental transcript). The only surprise petitioner has ever directly stated is that appearing on page 14 of his petition for certiorari where he argues that petitioner and counsel were surprised, not by the entry of the judgment, but " * * * by the irregular entry of the judgment * * * " It is possible to conclude that they were surprised to discover some clerical error after the time for appeal had been allowed to expire; the clerk had made a note of the mailing in the Day Book of Civil Division No. 3 beside the entry of the final decree rather than a note of mailing in the Civil Docket (statement). The mistake involved in the supposed omission to mail the notice of entry of judgment and the omission to make a note in the docket of the mailing was that of the clerk and not that of a party contemplated by Rule 60 (b).

It is apparent the action of the trial court referred to above in vacating the original order and reentering the same order as of a later date was surrounded by secrecy (Exhibit A at R. 65, Exhibit C at R. 67, 69, supplemental transcript). Thus the petitioner and the trial court treated the matter apparently as the correction of a clerical error and a device to extend the time for noting an appeal. That this was the intention was borne out by the later statement of the trial court that it did not wish to cut off anyone from his opportunity to have a review of its decision in the case (Exhibit B at R. 66). As stated above petitioner had filed no motion of any kind before the expiration of the twenty day period

for noting the appeal. The District Court properly denied petitioner's motion to enter judgment and direct clerk to notify parties filed after the twenty days had expired (Tr. 38, 39, 49, Supplemental Tr.) and there was no appeal from the denial of this motion. The situation is far different from that in *Leishman v. Associated Wholesale Electric Co.*, Law Ed. Adv. Opinions Vol. 87, No. 9, P. 495 decided after the opinion of the Court of Appeals in the instant case.

Application of Decisions of This Court.

The Court of Appeals properly applied two cases of this Court to the attempted action of the trial court to extend the time for noting the appeal. In *Credit Co. v. Ark. Central Ry.*, 128 U. S. 258, this Court held that the use of a *nunc pro tunc* order was ineffective to arrest or call back the time for taking an appeal which had expired; it could not make a dead letter of the law limiting the period for appeal. The trial court in the instant case arbitrarily vacated its judgment after the twenty period for appeal had expired and reentered it as of a later date so that petitioner could note his appeal from the later judgment. With such a record as exists in this case it would be difficult to think of a situation that called forth more strongly for the application of the rule of that case. The case of *Brooks v. Norris*, 11 How. 204, 52 U. S. 204, granted a motion to dismiss where it appeared of record that the writ of error was not issued until after the expiration of the five year period allowed from the day of the judgment for bringing writs of error. This Court upheld the granting of a motion to dismiss by the Court of Appeals of the District of Columbia for failure to note the appeal within the twenty days provided by Rule 10. *Ex Parte Dante, supra.*

The situation is analogous to that in the case of *United States v. East*, 80 F. 2d. 134, citing *Credit Co. v. Ark. Cent. Ry. supra.* The Court held that the entry of a new identical judgment after the expiration of 30 days from the date of the original judgment did not create another 30 day period for appeal, notwithstanding the fact that an *ex parte* petition for rehearing had been filed after expiration of the 30 day period and had been denied. This latter case was cited with specific approval in *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382, note 12, where this Court stated that if it appears that rehearing has been granted only for the purpose of extending the time for appeal the appeal must be dismissed. The correction of a clerical error in the entry of a judgment was held not to enlarge the time for taking an appeal from the original judgment. *Sterrett v. Shoemaker*, 47 App. D. C. 455.

No Ground for Certiorari.

The Court of Appeals below heard argument on the motion to dismiss at the hearing on the merits of the case and decided the same some time after arguments on the motion and the merits had been taken under advisement (R. 59, 60, 74, 79). It may be held that the Court of Appeals did not refuse to take jurisdiction, in which case petitioner's arguments for certiorari are without grounds. *Ex Parte First National Bank*, 228 U. S. 516, 57 L. Ed. 946, 33 S. Ct. 591.

Conclusion

The motion to dismiss of respondent for failure of petitioner to note his appeal within time was properly granted by the United States Court of Appeals for the District of

Columbia. There was authority for promulgation of its Rule 10. No question of general importance, nor question of substance relating to the Constitution, or a treaty or statute of the United States need be settled by this Court. There is nothing in the record to show that the Court of Appeals has not given proper effect to applicable decisions of this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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